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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

WESTLAND DEVELOPMENT COMPANY, INC.,
A NEW MEXICO CORPORATION,

Petitioner,

v.

CITY OF ALBUQUERQUE,
A MUNICIPAL CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

STEVEN L. TUCKER
TUCKER LAW FIRM, P.C.
125 Lincoln Ave., Suite 400
Santa Fe, New Mexico 87501
(505) 982-3467

Counsel for Petitioner

April 5, 1996

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fifth Amendment to the U. S. Constitution require that one whose property is partially taken by eminent domain receive as just compensation all damage to the condemnee's remaining land caused by the taking or only the damage to the condemnee's remaining land caused by the condemnor's activity on the piece of land taken from the condemnee?

2. Should this Court review its holding in *Campbell v. United States*, 266 U.S. 368 (1924), in light of the conflicting decisions emanating from that opinion on this question and the need for a uniform and clear standard to apply in these cases?

LIST OF AFFILIATED CORPORATIONS

Westland Development Company, Inc., has no parent corporation or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF AFFILIATED CORPORATIONS	ii
TABLE OF CITED AUTHORITIES	v
CITATION TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
ARGUMENT	8
A. In *Campbell*, the Court May Have Reached the Correct Result, but Its Reasoning Was Unclear	9
B. The Various Exceptions and Qualifications to the Strict *Campbell* Rule Have Created Arbitrary Sub-Rules Which Vary from Jurisdiction to Jurisdiction	11
1. The Three-Part Test for Avoiding the Strict Rule of *Campbell*	12
2. The "Integral and Inseparable Part" Test for Avoiding *Campbell*	15
3. The *Campbell* Rule	17
4. The Protection of the Fifth Amendment's "Just Compensation" Clause Varies from Jurisdiction to Jurisdiction in the Absence of Some Clarification by this Court of its Decision in *Campbell*	18

TABLE OF CONTENTS – Continued

Page

C. In this Case, the New Mexico Court of Appeals Improperly Relied on *Campbell* and Incorrectly Applied the Other Exceptions Which Have Developed in Other Jurisdictions 19

CONCLUSION 24

APPENDIX

Opinion of the New Mexico Court of Appeals dated October 23, 1995 .....App. 1

Order of the New Mexico Supreme Court dated December 13, 1995 .....App. 26

Order of the New Mexico Supreme Court dated January 9, 1996.....App. 27

Defendant Westland Development Company, Inc. Response to Petitioner's Motion in Limine dated July 15, 1991.....App. 28

Order Granting in Part and Denying in Part Petitioner's Motions in Limine and for Partial Summary Judgment dated June 24, 1993 .....App. 42

TABLE OF CITED AUTHORITIES

Page

CASES:

8,960 Square Feet, More or Less v. State, Dep't of Transp. & Pub. Facilities, 806 P.2d 843 (Alaska 1991) 17

Andrews v. Cox, 129 Conn. 475, 29 A.2d 587 (1942) 16, 23

Campbell v. United States, 266 U.S. 368 (1924) .... *passim*

City of Crookston v. Erickson, 244 Minn. 321, 69 N.W.2d 909 (1955) 16

County of Dona Ana v. Bennett, 116 N.M. 778, 867 P.2d 1160 (1994) 7

Griffith v. Montgomery County, 470 A.2d 840 (Md. Ct. Spec. App. 1984), *cert. denied*, 479 A.2d 373 (Md. 1984) 15

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 14

Hurst v. Starr, 79 Ohio App. 3d 757, 607 N.E.2d 1155 (1992) 21

Lee County v. Exchange Nat'l Bank, 417 So.2d 268 (Fla.App. 1982) 7

Miller v. City of Albuquerque, 89 N.M. 503, 554 P.2d 665 (1976) 7

Pack v. Boyer, 59 Tenn.App. 141, 438 S.W.2d 754 (1968) 17

People v. Volunteers of America, 21 Cal.App.3d 111, 98 Cal.Rptr. 423 (1971) 16

State by State Highway Comm. v. Board of Education, 116 N.J. Super. 305, 282 A.2d 71 (1971) 17

TABLE OF CITED AUTHORITIES – Continued

Page

State ex rel. Missouri Highway & Transport Comm. v. Horine, 776 S.W.2d 6 (Mo. 1989) 17

State Highway Comm. v. Bloom, 77 S.D. 452, 93 N.W.2d 572, 577 A.L.R.2d 533 (1958) 17

State v. Schmidt, 867 S.W.2d 769 (Tex. 1993) 15

United States ex rel. T.V.A. v. Welch, 327 U.S. 546 (1946) 13, 14

United States v. 15.65 Acres of Land, 689 F.2d 1329 (9th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983) 12, 14

United States v. Pope & Talbot, Inc., 293 F.2d 822 (9th Cir. 1961) 12

Utah Dep't of Transp. v. D'Ambrosio, 743 P.2d 1221 (Utah 1987) 18

OTHER CITED AUTHORITIES:

28 U.S.C. § 1257 1

Annot., *Compensation for Diminution in Value of the Remainder of Property Resulting From Taking or Use of Adjoining Land of Others for the Same Undertaking*, 59 A.L.R. 3d 488, 495 (1974) 19

New Mexico Constitution, Article II, Section 20 ....2, 7

Nichols, LAW OF EMINENT DOMAIN, § 14.01[4] 11, 13, 17, 23

Nichols, LAW OF EMINENT DOMAIN, § 14.01[7] 15

United States Constitution, Amendment XIV, Section 1 .....2, 24

United States Constitution, Amendment V...2, 7, 8, 19, 24

CITATION TO OPINIONS BELOW

The Opinion of the New Mexico Court of Appeals is reported as *City of Albuquerque v. Westland Development Co., Inc.*, ___ N.M. ___, 909 P.2d 25 (N.M.App. 1995), *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995).

JURISDICTION

The Opinion of the New Mexico Court of Appeals was entered on October 28, 1995. App. 1. Petitioner filed a timely petition for writ of certiorari with the New Mexico Supreme Court on November 13, 1995. The New Mexico Supreme Court entered its order denying the petition on December 13, 1995. App. 26. Petitioner filed a timely motion for rehearing from the order denying its petition for writ of certiorari on December 20, 1995. The New Mexico Supreme Court entered its order denying the motion for rehearing on January 9, 1996. App. 27.

This Court has jurisdiction to issue a writ of certiorari to the New Mexico Court of Appeals pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment V.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution Amendment XIV, Section 1.

Private property shall not be taken or damaged for public use without just compensation.

New Mexico Constitution, Article II, Section 20.

STATEMENT OF THE CASE

Westland Development Company, Inc. ("Westland") is a New Mexico corporation which owns property on the west side of Albuquerque, New Mexico. Some of Westland's land had been sold to residential developers, but Westland had retained the great majority of it for future development.

The Respondent City of Albuquerque ("the City") had previously acquired some undeveloped land adjoining Westland's property. The City filed the instant action for condemnation against the Petitioner, Westland Development Company, Inc. ("Westland") and others to acquire property leading to a proposed landfill (to be called the "Cerro Colorado Landfill") to be located on land already owned by the City. The landfill site did not have access to public streets, and the City was therefore unable to use the site as a landfill. In order to create and operate the landfill, it was necessary for the City (1) to make major improvements to an existing frontage road, (2) to acquire land for an access road between the frontage road and the proposed landfill site, and (3) to create the landfill itself on land owned by the City. These three actions will sometimes be referred to collectively as "the landfill project."

The frontage road bordered Westland's property, and the proposed new access road would cross, and be taken from, Westland's property. The following is a sketch, used by the Court of Appeals (App. 3), accurately illustrating the relative location of the highway, the frontage road, the proposed access road through Westland's property and the Cerro Colorado Landfill:

Interstate 10
Central Avenue
Paseo del Volcan
Interstate 40
Frontage Road
WESTLAND PARCEL
Access Road
Carre Colorado Landfill

The City sought to condemn 22.788 acres of Westland's property in order to create the access road sixty feet wide and 2.5 miles long from the frontage road to the landfill site, which adjoined Westland's property. Therefore, three actions were necessary in order to create and to operate this landfill site. First, the City had to upgrade the frontage road. Secondly, the City had to acquire and to build the access road. Third, the City had to create the landfill itself. The City has a state license to operate the landfill on 192 acres of the landfill site, and this area has an expected life expectancy as a landfill site of 27 years. In other words, it is expected that this site will be full in 27 years.

The upgrade of the frontage road made a major change in its nature and use. It had been a rural, seldom-used gravel road. The upgrade called for improvement to a hard-surfaced, two-lane, high-speed secondary highway built to support garbage trucks with up to 80,000 pound capacities travelling back and forth several times a day. After the City obtained the right of entry and completed the landfill project, heavily loaded City garbage trucks have been making up to 233 round trips (466 one-way trips) per day, seven days a week, along the upgraded frontage road and along the access road to the landfill site. In addition to the traffic of the City-owned garbage trucks, garbage trucks owned by the county and private haulers were to use the landfill. Garbage trucks from all over the City of Albuquerque were to be funneled into the frontage road, along the access road and to the landfill site. As the court below observed, during normal operations "a steady flow of garbage trucks

passes along the frontage road and then down the access road to the landfill." App. 2.

In addition to damage by the added traffic, Westland's remaining property was substantially damaged by the effect of trash, odor, dust, and debris blowing from both the landfill site and from the trucks travelling on the landfill site and going along the frontage road and the access road to and from the site.

Early in the litigation, it became clear that the City and Westland had very different views as to what items could be included as damages in the condemnation action. The City claimed that Westland could recover only for the damage caused by the City's use of the 22.788 acres constituting the access road to the landfill site, and that Westland had no right to recover for the damage caused by the increased use of the frontage road or by the use of the landfill itself. Westland contended that it was entitled to all damage caused by the landfill project, since without the access road going through its property there would be no landfill. The taking of the access road, for the purposes stated in the petition, proximately caused the City's use of the landfill site and use of the frontage road which, in turn, caused substantial damage to Westland's remaining property.

Before trial, the City filed a motion in limine seeking an order precluding Westland from introducing "any evidence of the effect of the existence of the Cerro Colorado Landfill on the value of the Defendant's land." It later expanded its motion to seek an order precluding Westland from introducing any evidence of damage from the increased traffic on the frontage road. The City relied

most strongly on this Court's opinion in *Campbell v. United States*, 266 U.S. 368 (1924), which interpreted the "just compensation" clause of the Fifth Amendment and held, under the unique facts of that case, that the landowner could not recover for the damage to his remaining land from planned activities which were not on the land taken from that landowner but instead were to be on lands taken from others. On July 15, 1991, Westland filed its response to the City's motion in limine in which it relied on the just compensation clauses of the Fifth Amendment to the United States Constitution and Article II, Section 20 of the New Mexico Constitution.[1] App. 29-30. Westland challenged the City's analysis of *Campbell* and its progeny and argued that subsequent federal and state cases have carved out exceptions and qualifications to the strict rule stated in *Campbell*. App. 32-38. Specifically, Westland argued that subsequent cases have refused to apply *Campbell* where "the use of the land taken constitutes an integral and inseparable part of the use to which the land taken and other adjoining land is put," *quoting Lee County v. Exchange Nat'l Bank*, 417 So.2d 268 (Fla.App. 1982). App. 33. The motion was argued to the trial court which ruled in favor of the City, granted its motion in limine, and ruled as a matter of law that

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[1] The New Mexico Supreme Court has deemed the "just compensation" clause in Article II, Section 20 of the New Mexico Constitution to be the equivalent of the "just compensation" clause of the Fifth Amendment to the United States Constitution. *See, e.g., County of Dona Ana v. Bennett*, 116 N.M. 778, 782, 867 P.2d 1160, 1164 (1994); *Miller v. City of Albuquerque*, 89 N.M. 503, 505, 554 P.2d 665, 667 (1976).

Westland may not recover "[d]amages, if any, to Westland's property resulting from the creation, existence, or operation of the Cerro Colorado Landfill" or "[d]amages, if any, resulting from the increased traffic on the upgraded frontage road to and from the Cerro Colorado Landfill . . . " App. 44. The court included language permitting Westland to seek an interlocutory appeal of this ruling. App. 43. Westland's application to the New Mexico Court of Appeals for an interlocutory appeal of this ruling was denied, and the case went to trial.

ARGUMENT

In the 72 years since *Campbell* was decided, the lower federal and state courts have diverged on its meaning and application. Rather than clarifying the issue of whether a landowner is entitled to compensation for damage caused to his remaining land by a project some of which is located on land taken from others, the *Campbell* case has spawned disagreement, criticism, and confusion on that issue. It is time for the Court to revisit the issue and to clarify the requirements of just compensation under the Fifth Amendment in this context.

First, Petitioner will review the *Campbell* case. Then, Petitioner will review the various conflicting interpretations, applications and criticisms of that case. Finally, Petitioner will present its position on why this Court should take this case to resolve the problems created by *Campbell* and its progeny.

A. In *Campbell*, the Court May Have Reached the Correct Result, but Its Reasoning Was Unclear.

Campbell is a very short opinion; its facts are few; its reasoning is not clear. In 1918, during World War I, the United States decided to build a nitrate plant. To do so, it took possession of a 1,300-acre tract of land from many sources. As part of this taking, it took possession of a 1.81 acre parcel of Campbell's which was separated from the remainder of his 69.73 acre tract by a public road. The small tract taken was a garden, lying at the foot of a hill on which plaintiff's residence was situated. After the armistice, the project was abandoned and the United States planned to sell the property which had been taken from Campbell.

Campbell sued for inverse condemnation. The district court found that the value of the land was $750, the damage to Campbell's remaining property by virtue of the land taken was $2,250, and the damage to Campbell's remaining property by virtue of the lands taken from others was $5,000. The court entered judgment for $3,000, holding that the last item of damage was not recoverable. Campbell (appearing pro se) appealed to this Court, and this Court affirmed.

The Court's reasoning is expressed as follows:

> The land taken from plaintiff was not shown to be indispensable to the construction of the nitrate plant or the the proposed use of the other lands acquired by the United States. The damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others. The proposed use of the

> lands taken from others did not constitute a taking of his property. . . . Plaintiff cites and relies upon Blesch v. Chicago & Northwestern Railway Co., 43 Wis. 183, C., K. & N. Ry. Co. v. Van Cleave, 52 Kan. 605, 33 P. 472, and Haggard v. Independent School District, 113 Iowa 480, 85 N.W. 777, to support his contention that he is entitled to have the damages found to have resulted to the remainder of his estate by the uses made and to be made of the lands acquired from others. In each of these cases, it was impossible separately to ascertain the damages caused to the remainder of the owner's tract by the taking and proposed use of a part of it. In this case, such damages were separately found, and plaintiff does not complain in respect of the amount of that element. We think that plaintiff's position is not sustained. The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking [citing five state cases and one English case.]

266 U.S. 371-372.

The last sentence of this quotation purports to lay down a broad rule that damages caused by activities on lands taken from others are never recoverable. Yet, earlier, the Court noted (1) that the land taken was not indispensable to the project, and (2) Campbell conceded that the damages caused by the activity on the land taken from him were separable from the damages caused by the activity on the land taken from others. Were these two

factors meant to be qualifications to the rule stated, or merely reasons leading to a broad and inflexible rule precluding the recovery of such damages in all cases? And if they are qualifications, how are they to be applied? Courts in subsequent cases have struggled with these questions.

As the leading commentator on eminent domain has observed, the Court could have affirmed the judgment on other grounds, such as the fact that Campbell's property was too remote from the damage caused by the plant or because Campbell's property was not indispensable to the project and therefore its taking was not causally related either to the project or to Campbell's damages. Nichols, LAW OF EMINENT DOMAIN, § 14.01[4], p. 14-15. The Court may have reached a correct result in *Campbell*, but it did not need to lay down this broad rule, with its possible qualifications or exceptions, which has since caused great problems in application.

B. The Various Exceptions and Qualifications to the Strict *Campbell* Rule Have Created Arbitrary Sub-Rules Which Vary from Jurisdiction to Jurisdiction.

Nothing demonstrates the need for review better than the turmoil left in the wake of *Campbell*. As the New Mexico Court of Appeals said, in an understatement, "some courts have tempered what appears to be the strict rule of *Campbell*." Indeed, very few Courts are satisfied applying the strict rule of *Campbell*, and most courts have struggled with ways to avoid it.

1. The Three-Part Test for Avoiding the Strict Rule of *Campbell*.

The Ninth Circuit has developed a three-part test for avoiding the strict rule of *Campbell*. Beginning in *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961) and later refined in *United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1332 (9th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983), the Ninth Circuit has held that, notwithstanding the strict rule of *Campbell*, the landowner whose land was partially taken would be entitled to recover damages to his remaining land caused by activity on the land taken from others if three tests are met:

> (1) the land taken from the condemnee landowner was indispensable to the dam project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the dam project. Thus, three elements, indispensability, substantiality, and inseparability, are necessary to negate the application of *Campbell*.

689 F.2d at 1332.

The second test, substantiality, was not mentioned in *Campbell* but was taken from the Ninth Circuit's earlier decision in *Pope & Talbot*. The stated purpose of that element is that it "tends to assure the existence, in fact of indispensability." *U. S. v. 15.65 Acres*, at 1332. In the case at bar, the 22.788 acres for the access road to the 192-acre

landfill is a "substantial (not inconsequential) part of the tract devoted to the project."

The first element of "indispensability," has been criticized by the leading commentator on eminent domain because it makes no sense. In condemnation cases, where the government proceeds to obtain judicial approval to take private property for public purposes, the property to be taken must always be indispensable to the project or it cannot lawfully be taken. The element of "indispensability" in this three-part test, therefore,

> completely ignores the fact that *property can be taken* by a public agency from private individuals for public use *only where that property is necessary for the public purpose.* If there is no necessity for the taking of private land for public purpose, then there is not a lawful taking. It logically follows that once a taking has occurred, the government has conceded that the property is an integral and necessary part of the project to be constructed.

Nichols, LAW OF EMINENT DOMAIN, § 14.01[4], p. 14-15 through 14-16. (Emphasis added).

See also, United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 554-555 (1946) (where public need requires acquisition of property, public authority may condemn property and must give the owner just compensation as required by the constitution). Therefore, either the condemnor needs the property or it does not. If it does, it may condemn the property and, in that event, must pay the owner just compensation. If it does not need it, it may not

condemn it. In every case of lawful condemnation,[2] the property taken must be necessary and indispensable to the project. Therefore, the first and second elements of this three-part test are illogical and unfounded in fact or reason.

The third part of the three-part test is that the landowner must show that the damages to his remaining land caused by the use of the land taken from him is "inseparable" from the damages caused by the use of land taken from others. The purpose of this requirement, according to the court, is that it

> tends to assure that the *injury* to the land not taken *does not arise from a use independent of the project* with respect to which the property taken was indispensable.

689 F.2d at 1332. (Emphasis added).

If the damages arise from use of the land taken from others, and if that land is indispensable to the project,

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[2] Since *Campbell* was the origin of this "indispensability" element, it is noteworthy that it was an inverse condemnation case. The government took the property without going through any judicial procedure, and the landowner sued for compensation. The Court's determination that the land taken from Campbell was not "indispensable" simply meant, in that context, that the government took more land than it had the right to take. In condemnation cases, as opposed to inverse condemnation cases, the public authority normally determines that it is necessary to condemn the property for a public purpose, and its decision is accorded great deference. *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546 (1946) (deference to Congress); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (deference to state legislatures).

those damages should never arise "from a use independent of the project with respect to which the property taken was indispensable." Therefore, this element is also arbitrary and unfounded.

Nichols suggests that the issue should be one of causation or remoteness of damages. He would reframe this third element as follows:

> The question should really be: are the damages resulting to the land not taken, from the use of the land taken a direct, natural and non-remote consequence of the project, and consequently, do they diminish the value of the remainder by the presence of the project, and as a result of the taking?

Nichols, LAW OF EMINENT DOMAIN, § 14.01[7].

This three-part test is applied not only by the Ninth Circuit but also by some state courts. *See, e.g., State v. Schmidt*, 867 S.W.2d 769, 778 (Tex. 1993); *Griffith v. Montgomery County*, 470 A.2d 840 (Md. Ct. Spec. App. 1984), *cert. denied*, 479 A.2d 373 (Md. 1984).

The three-part test was ostensibly taken from *Campbell* as a means of avoiding the strict rule of that case. When each of the elements of the test is examined, it is difficult or impossible to justify any of them.

2. The "Integral and Inseparable Part" Test for Avoiding *Campbell*.

Other courts, probably the majority, apply a one-part test, and avoid *Campbell* if the land taken is "an integral and inseparable part" of the improvement or project as a

whole. This approach is based on a causation analysis: if the part taken is an inseparable part of the whole project and the landowner has been damaged by the whole project, then the taking of his property is causally related to the damage to this landowner from the whole project. Accordingly, he should be compensated for that damage.

The leading cases are *Andrews v. Cox*, 129 Conn. 475, 29 A.2d 587 (1942); and *City of Crookston v. Erickson*, 244 Minn. 321, 69 N.W.2d 909 (1955), both of which are discussed and erroneously distinguished by the court below. Typical of these cases is *People v. Volunteers of America*, 21 Cal.App.3d 111, 98 Cal.Rptr. 423 (1971), in which a public highway authority was engaged in a condemnation project to build a freeway. On one tract, it condemned a narrow triangular strip of the landowner's property, measuring about 82 feet on two sides and 5.89 feet on the other. The freeway was to run directly in front of the owner's property. The public authority contended that the triangular strip was not to be used for the roadbed of the freeway but that the use of the strip was for a fence to keep pedestrians and other traffic away from the freeway. Therefore, it contended that the landowner should be compensated for any damage caused by the placement of the fence but that the damage caused by the freeway was noncompensable since the roadbed was not taken from plaintiff's land. The court disagreed and held for the landowner. It held that damages to the remaining property include damages resulting from the entire project, not just the landowner's portion of it, when "the property taken is an integral part of the right of way upon which the improvement is to be constructed, maintained, and used." 98 Cal.Rptr. at 428.

Other courts which apply this one-part test include *State ex rel. Missouri Highway & Transport Comm. v. Horine*, 776 S.W.2d 6 (Mo. 1989); *State by State Highway Comm. v. Board of Education*, 116 N.J. Super. 305, 282 A.2d 71 (1971); *Pack v. Boyer*, 59 Tenn.App. 141, 438 S.W.2d 754 (1968); and *State Highway Comm. v. Bloom*, 77 S.D. 452, 93 N.W.2d 572, 577 A.L.R.2d 533 (1958).

Although this one-part test is analytically more sound than the three-part test, it is difficult or impossible to imagine a case where a parcel which is necessary for use in a larger project is not an integral and inseparable part of the project. Again, as Nichols observes,

> It logically follows that once a taking has occurred, the government has conceded that the property is an integral and necessary part of the project to be constructed.

Nichols, LAW OF EMINENT DOMAIN, § 14.01[4], p. 14-16.

Therefore, the one-part test is unnecessary and inappropriate. In condemnation cases, courts should not engage in the process of deciding whether one or more parts of a project are "integral" or "inseparable" from the remainder of the project. In the *T.V.A.* case, n. 2, above, this Court refused to second-guess the condemning authority on whether the various constituent parts of its project were necessary to the condemnation.

3. The *Campbell* Rule.

The court below flatly stated: "Most jurisdictions that have considered the matter apply the *Campbell* rule." App. 12. The court cited, as examples, *8,960 Square Feet*,

More or Less v. State, Dep't of Transp. & Pub. Facilities, 806 P.2d 843, 846 (Alaska 1991); and *Utah Dep't of Transp. v. D'Ambrosio*, 743 P.2d 1221 (Utah 1987). Petitioner's research demonstrates that most jurisdictions do not follow the *Campbell* rule, at least not without substantial qualifications or exceptions as pointed out above. However, some jurisdictions clearly do follow *Campbell*, thus creating another category of jurisdictions divided on this issue.

4. The Protection of the Fifth Amendment's "Just Compensation" Clause Varies from Jurisdiction to Jurisdiction in the Absence of Some Clarification by this Court of its Decision in *Campbell*.

The foregoing is just a brief summary of the divergence of authority on this issue. One commentator who exhaustively researched the cases in this area confirmed this disarray and described the problem in this way.

> It would appear from a general reading of the cases in the various categories that it is impossible to reconcile them on the basis of the peculiar fact situations, or on the basis of the application of the general rule or the rationale thereof, with a result that the rule predicating consequential damages to situations in which there was an actual taking of property and the limiting of consequential damages to the remainder to the diminution of the value attributable to the land taken (as distinguished from land taken from others) creates a seemingly unsatisfactory procedure.

Annot., *Compensation for Diminution in Value of the Remainder of Property Resulting From Taking or Use of Adjoining Land of Others for the Same Undertaking*, 59 A.L.R. 3d 488, 495 (1974).

In an attempt to follow *Campbell* and to apply it to different factual situations, the courts have reached different views on which rules to apply, the rationale for such rules, or how to apply them to various circumstances. The Fifth Amendment guarantee of "just compensation" is a vital and fundamental property right; property owners have no choice when a public authority needs to take their property but they do have a constitutional right to "just compensation" when their property is taken. There should be one fixed standard by which damages are determined in cases of a partial taking, such as this. That standard should be clear. This is why this Court should grant this petition in order to review and clarify these principles.

C. In this Case, the New Mexico Court of Appeals Improperly Relied on *Campbell* and Incorrectly Applied the Other Exceptions Which Have Developed in Other Jurisdictions.

In the instant case, the Court of Appeals did not properly apply the law. It clearly based its holding on *Campbell*. Although it reviewed the other lines of authority, it did not adopt them since it determined that Westland could not prevail under them in any event. The rule it adopted for New Mexico is the strict *Campbell* rule: a landowner can never recover damages for activity or uses on land taken from others even though those activities or

uses were caused by the taking of his property. In adopting and applying the strict *Campbell* rule, the court erred.

The court's reasoning is based on the proposition, which cannot be disputed, that one who has no land taken is not entitled to be compensated for uses or activities on land taken from others. It does not follow, however, that one who has land taken should not be compensated for the damages caused by that taking, including damage caused by activities on another part of the unified project. One commentator has stated that comparing the rights of a landowner whose property is taken to one whose property is not taken in order to justify a denial of compensation to the former is a position "which does not withstand examination and breaks down into arbitrary thesis both in theory and application." Annot., at 492. The fact that those from whom no land is taken (and who therefore may recover nothing) suffer damages similar to those from whom property is taken is no justification for denying just compensation for all damages resulting to the latter by the taking.

> [W]hen there is a partial take, damage to the residue may properly be considered in accordance with the fair market value rule, despite the fact that other property owners located in the vicinity from whom no land was taken may not recover any damages. If a special-circumstance rule is to be used, it applies because the special circumstances are that part of the property owner's land was taken, leaving a damaged residue. Those special circumstances do not apply to the property owners from whom no land was taken, since their property remained intact.

Hurst v. Starr, 79 Ohio App. 3d 757, 764, 607 N.E.2d 1155, 1159 (1992).

Likewise, the court's causation analysis is flawed. It reasons that if the City had obtained access through another route and not condemned Westland's property, then clearly Westland would have no right to compensation from the operation of the landfill. App. 12. Therefore, the court concluded, the taking of the access road was not the cause of Westland's damages from the landfill. However, as a factual matter, it was the City that determined that the condemnation of Westland's property was necessary for this landfill project and, therefore, sought to take it by eminent domain. It did not obtain other access; it took Westland's property. Therefore, without Westland's property, the City had no access to the landfill site. Without this taking of Westland's property, Westland would not suffer damages from the landfill and from the traffic to, from, and on the landfill. Therefore, the taking was causally related to the damages Westland suffered and for which it seeks just compensation.

The court's application of the three-part rule is also flawed. It summarily states that Westland fails the third part of the three-part test because "the damages from the use of the condemned portion of the parcel were separable from those caused by use of the frontage road and by proximity of the landfill." App. 16. Why are those damages separable? According to the court, because "the trial judge had no apparent difficulty" (App. 14) admitting evidence of damage caused by the traffic on the access road and excluding evidence of damages caused by the landfill and traffic on the frontage road. In other words, damages are "separable" whenever a judge determines

that evidence of one kind of damage will be allowed, damage of another kind will not be allowed, and the condemnee, over protest and objection, tries to offer the evidence that will be allowed.

The trial court gave Westland a Hobson's choice, which is no choice at all. The court ruled that the only damages Westland could recover were those resulting from the taking of the access road itself, not from the operation of the landfill or the use of the upgraded access road. App. 44. Under these circumstances, neither the judge's ruling nor Westland's offer of this limited evidence, over its objection, rendered these damages "separable."

The damages from the use of the access road are not inherently separable from those arising from the use of the access road or the use of the landfill site. First, the damages resulting from the trucks themselves arise on all three parts of the project because the trucks carry trash on all three parts of the project. The trucks do not stop at the end of the access road taken from Westland and dump the trash on the landfill site at that single point; they travel on the landfill site as well as on the access road and the frontage road. The trucks themselves cause damage to the remainder of Westland's property in the form of blowing dust, debris and trash, and the odor of the garbage being carried by the trucks and the trucks' exhaust. That damage is the same whether the trucks are on the landfill site, the access road, or the frontage road. Certainly that damage is not separable. Moreover, a prospective homeowner may be unable to separate out whether the blowing dust, debris, trash, odor, etc., he sees on his prospective lot came from the landfill site

itself or from the trucks on the access road or the frontage road. Thus, Westland is damaged by the homeowner's reasonable perception regardless of whether some expert can separate out precisely where these damages originated. These damages are not separable in the real world, and the court's determination to the contrary is arbitrary and unfounded.

Finally, the court determined that the rule in *Andrews* and other cases would not apply because the access road was not "an integral and inseparable part" of the landfill project. App. 18. A landfill project requires for its operation a means for refuse to be delivered to the site; without it, the project fails. This is another example of how damages are arbitrarily denied on the basis of a court's determination of whether one part of a project is an "integral and inseparable part" of the whole project. The same result should follow here. It was the City that determined that this access road was necessary to this entire project; it should not now be heard to claim otherwise. Once again, as Nichols said,

> It logically follows that once a taking has occurred, the government has conceded that the property is an *integral and necessary part* of the project to be constructed.

Nichols, LAW OF EMINENT DOMAIN, § 14.01[4], p. 14-16. (Emphasis added).

The decision below illustrates better than any of the others that the lower state and federal courts need guidance from this Court as to the continued vitality of the principles and holding in *Campbell* and on the principles applicable to the determination of just compensation for a

partial taking. Although this is a state case, this Court's decision in *Campbell* was based on state, not federal, authority. Presumably, the Fifth Amendment finds its most common application in state cases because arguably the larger volume of condemnation actions arise in state courts. Litigants in state courts are as much protected by the Fifth Amendment as litigants in federal courts.[3] The instant case presents the ideal occasion for this Court to review its decision in *Campbell* and to clarify the standard applicable to the issue of "just compensation" for partial takings.

CONCLUSION

For these reasons, Petitioner respectfully prays for this Court to issue its writ of certiorari to the New Mexico Court of Appeals.

Respectfully submitted,

TUCKER LAW FIRM, P.C.
125 Lincoln Ave., Suite 400
Santa Fe, NM 87501-2005
(505) 982-3467

Attorney for Petitioner

[3] The Fifth Amendment has been incorporated into the Due Process Clause of the Fourteenth Amendment. *See, Hawaii Housing*, n. 2 above, at 244, n. 7.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE, a municipal corporation,

Plaintiff-Appellee,

vs.

WESTLAND DEVELOPMENT CO., INC., a New Mexico Corporation,

Defendant-Appellant.

No. 15,667

(Filed Oct. 23, 1995)

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
GERALD R. COLE, District Judge

ROBERT M. WHITE, City Attorney
ROBERT I. WALDMAN, Assistant City Attorney
EDWARD R. PEARSON, Assistant City Attorney
Albuquerque, New Mexico

Attorneys for Plaintiff-Appellee

ROBERT S. SIMON
Albuquerque, New Mexico

RICHARD L. RUSSELL
Santa Fe, New Mexico

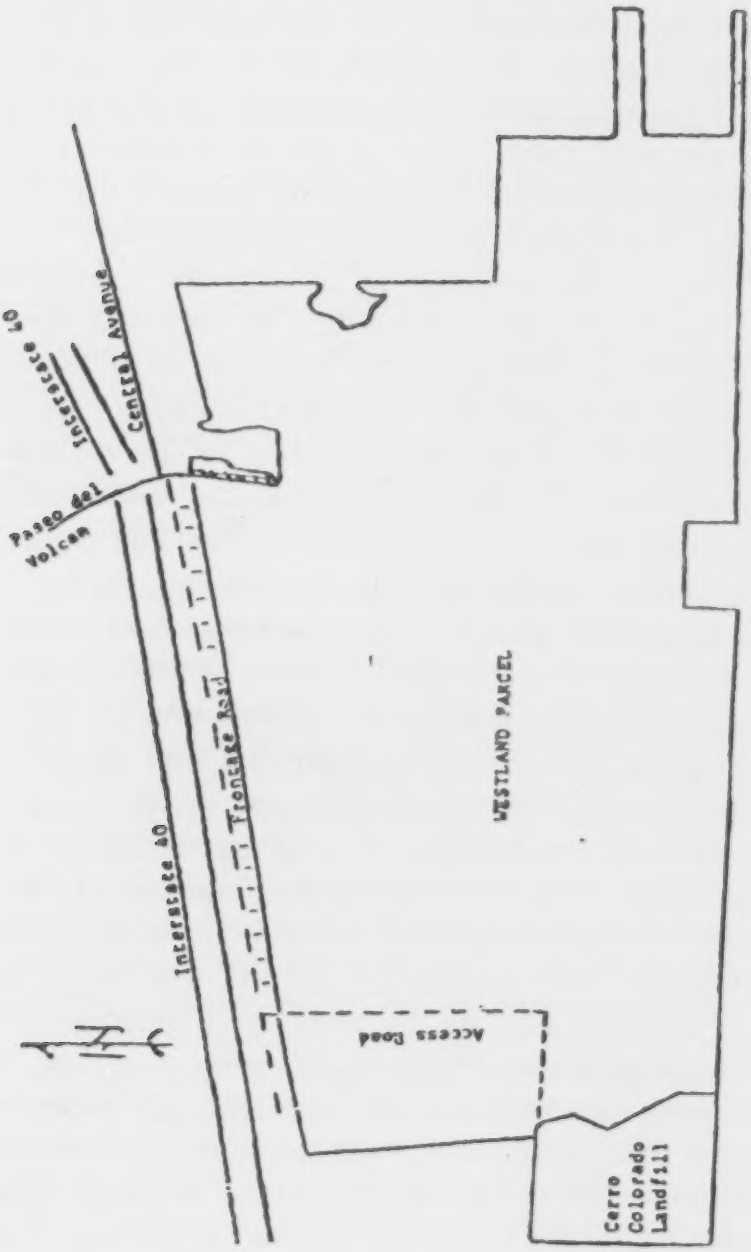
Attorneys for Defendant-Appellant

OPINION

HARTZ, Judge.

1. Westland Development Company, Inc., (Westland) appeals a district court judgment awarding it $75,000 as compensation for a taking by the City of Albuquerque (City) of 22.788 acres out of a 14,977.21 acre parcel owned

by Westland. The parcel is on the west side of Albuquerque south of Interstate 40 near the Paseo del Volcan exit to Interstate 40. The portion taken was a 60-foot-wide right of way for an access road leading from the frontage road on the south side of Interstate 40 to the Cerro Colorado Landfill, which adjoins the southern portion of the western border of Westland's parcel. The frontage road and landfill were already City-owned property. To prepare for the operation of the landfill, the City not only built the access road through Westland's parcel but also upgraded the frontage road on the northern boundary of the parcel from a gravel road to a two-lane asphalt highway. During normal operation of the landfill a steady flow of garbage trucks passes along the frontage road and then down the access road to the landfill. The following diagram shows the locations of the features that are relevant to this decision.


Interstate 10
Central Avenue
Paseo del Volcan
Interstate 10
Frontage Road
WETLAND PARCEL
Access Road
Cerro Colorado Landfill

2. The trial judge instructed the jury that Westland was entitled to damages for the value of the right of way taken from Westland and for any reduction in the value of the remainder of Westland's parcel "resulting from the use by vehicles of the Cerro Colorado Landfill in traversing the road construction on the condemned property." Westland's principal contention on appeal is that the trial judge improperly limited the damages that it could recover for the reduction in value of the uncondemned portion of its parcel. According to Westland, not only should it be entitled to the reduction in value of the uncondemned portion arising from the use of the access road, but also it should be entitled to any reduction in value caused by the proximity of the landfill and the increased use of the frontage road. Westland argues that the opening of the landfill, the building of the access road, and the upgrading of the frontage road are all part of one project, the Cerro Colorado Landfill project (the Project), and it is entitled to compensation for the reduction in the value of its uncondemned land caused by the entire Project, not just for damages caused by use of the access road. In addition, Westland argues that the following errors require reversal of the judgment: (1) the trial judge violated the pretrial order in allowing the City to introduce certain evidence, (2) the trial judge misled Westland into limiting the testimony it presented, (3) the trial judge denied Westland due process of law by not allowing two Westland directors the right to attend the entire trial, (4) the trial judge improperly refused to permit a member of the Westland board to testify regarding damages, (5) the trial judge improperly refused to permit Westland to introduce impeachment evidence on cross-

examination of City witnesses, and (6) the trial judge improperly excluded photographs and denied a jury view. We affirm.

3. I. MEASURE OF DAMAGES FOR TAKING

The City commenced this case by filing a verified complaint for condemnation pursuant to the New Mexico Eminent Domain Code, NMSA 1978, § 42A-1-1 through -33 (Repl. Pamp. 1994). Under the New Mexico Constitution, "Private property shall not be taken or damaged for public use without just compensation." N.M. Const. art. II, § 20. Section 42A-1-26 sets forth the measure of just compensation that should be awarded when only a portion of a parcel has been taken. It states:

> In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed non-compensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value to the property not taken.

Section 42A-1-26 simply codifies what is required to satisfy the constitutional command of "just compensation." *See State ex rel. State Highway Comm'n v. Hesselden Inv. Co.*, 84 N.M. 424, 426, 504 P.2d 634, 636 (1972), *overruled on other grounds by County of Dona Ana ex rel. Board of County Commr's v. Bennett*, 116 N.M. 778, 867 P.2d 1160 (1994). We therefore may look for guidance to courts and other authorities who have construed requirements of "just compensation" in various state constitutions and in the Fifth Amendment to the United States Constitution.

4. The apparent simplicity of the statutory formula – "the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking" – is deceptive. The "before and after" formulation of the rule establishes the temporal component of the calculation – the moment for which the calculation is to be made, *see generally Bennett* – but there is also a "causation" component. The necessity of the causation component becomes apparent when one considers how a purely temporal before-and-after calculation – one with only a temporal component – would work in practice. The result would likely be an award of little or no compensation for diminution of value of the uncondemned portion of the property. To establish the fair market value of the uncondemned portion immediately before the taking, one would estimate what price prospective purchasers would have offered at that time. But such hypothetical purchasers would necessarily take into account that a condemnation would occur soon (or immediately) after the purchase and that the value of the remaining property would be enhanced or diminished by

the use to be made of the portion taken. Thus, the fair market value of the uncondemned portion would be essentially the same immediately before and immediately after the taking, because immediately before the taking the prospective purchaser would know with virtual certainty that a taking would be consummated.[1]

5. What is missing from a purely temporal before-and-after rule is the recognition that just compensation requires payment for the diminution in property value *caused* by the taking. To compensate justly for the taking, the "before" value must be calculated as if no taking were to take place and the "after" value calculated as if the taking had already occurred. Then the calculation computes the diminution in value caused by the condemnation. Thus "the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking" is shorthand for "the difference between the fair market value of the entire property immediately before the taking (assuming that the prospective condemnation is not taken into consideration) and the fair market value of the property remaining immediately after the taking (taking the condemnation into consideration)."

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[1] In this discussion we ignore the possibility that the precondemnation prospective purchaser would include in the valuation of the property the right to compensation from the government for diminution in the value of the remainder of the property. To take that possibility into account would be to introduce a circularity of reasoning, because the amount of compensation depends upon what a prospective buyer would pay.

6. The above discussion of the meaning of the statutory language may seem elementary. It leads, however, to the heart of the dispute between Westland and the City. When determining how much the value of the property has been affected by the condemnation, what features of the condemnation are to be taken into consideration? In other words, what causes of loss of value are compensable? Is the sole compensable cause the loss of ownership of the portion of the parcel that is condemned? Does the comparison in values also take into consideration the effect of the use to be made of the condemned portion? Or does one consider the effect of the entire project of which the condemnation is a part? Translating these questions to the present case, should the award to Westland be the decrease in value of its parcel resulting (1) solely from the loss of the strip to be used as the right of way for the access road, (2) from the loss of the strip plus the use of the strip for traffic, including garbage trucks, or (3) from the loss of the strip plus the impact of the entire Project, including traffic on the access road, increased traffic on the frontage road, and damages from proximity of the landfill?

7. New Mexico case law answers the questions in part. In *City of Santa Fe v. Komis*, 114 N.M. 659, 845 P.2d 753 (1992), our Supreme Court considered an award to the owner of property in Santa Fe which was partially condemned for construction of a highway to transport nuclear waste to the Waste Isolation Pilot Project near Carlsbad. The Court held that the property owner should be compensated for the diminution in value of the uncondemned land caused by public fear of the use of the highway to transport nuclear waste, regardless of

whether the fear was well-founded. *Id.* at 661, 845 P.2d at 755. Although the opinion did not address specifically the issues that arise on this appeal – the focus of the discussion was whether fear that causes a diminution in value must be well-founded – the holding clearly implies that compensation must be paid for a diminution in value of the remaining land caused by the use of the taken portion. We conclude that the trial judge in this case correctly gave the jury an instruction that Westland was entitled to compensation for the loss in value caused by traffic along the access road adjacent to its remaining land, an instruction that the City has not challenged on appeal. Westland was entitled to at least that much compensation.

8. *Komis,* however, does not completely answer our questions. It did not address whether it is appropriate to take into account a reduction in value of the uncondemned portion caused by activities that do not occur on the condemned portion but result from the project of which the condemnation is a part. Thus, we look to authority elsewhere.

9. Examination of the case law from other jurisdictions is particularly appropriate in this context. There is no *a priori* formula to apply in determining what factors should be considered in awarding compensation for a taking of private property. As the very term "just compensation" suggests, the touchstone is justice, or fairness. To avoid reliance on our personal, perhaps idiosyncratic, notions of justice and fairness, we should test our views against the work of other courts that have confronted similar issues. Moreover, to the extent that just-compensation doctrine takes into account utilitarian considerations – such as the desirability of clear rules (to avoid

devoting excessive time, energy, and money to resolution of disputes) and maintaining the morale of property owners (so that a fear of governmental expropriation does not discourage investment and development), *see generally Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1208-18 (1967) – the practical insights and experience of other jurisdictions may be of great value.

10. Our research compels the conclusion that in this case damages from the proximity of the landfill and from increased traffic on the frontage road are not compensable. The leading case on the subject is *Campbell v. United States*, 266 U.S. 368 (1924). It is generally viewed as permitting consideration of only those damages to the uncondemned portion of a parcel caused by the use of the condemned portion. The United States Government had condemned 1300 acres to be the site for a nitrate plant. Campbell sought compensation for the taking of 1.81 acres of his land as part of the site. The unanimous Court held:

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

Id. at 372. The Court explained:

> The land taken from plaintiff was not shown to be indispensable to the construction of

> the nitrate plant or to the proposed use of the other lands acquired by the United States. The damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others. The proposed use of the lands taken from others did not constitute a taking of his property. Plaintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply; and there is no statute applicable in this case that enlarges the constitutional right. If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users.

Id. at 371-72 (citation omitted). The Court distinguished some earlier state cases on the ground that in those cases it had been "impossible separately to ascertain [(1)] the damages caused to the remainder of the owner's tract by the taking and proposed use of a part of it [and (2) the

damages caused by the use made of lands acquired from others]." *Id.* at 372. Most jurisdictions that have considered the matter apply the *Campbell* rule. *See, e.g., 8,960 Square Feet, More or Less v. State, Dep't of Transp. & Pub. Facilities*, 806 P.2d 843, 846 (Alaska 1991); *Utah Dep't of Transp. v. D'Ambrosio*, 743 P.2d 1220 (Utah 1987). *See generally* Annotation, *Compensation for Diminution in Value of the Remainder of Property Resulting from Taking or Use of Adjoining Land of Others for the Same Undertaking*, 59 A.L.R.3d 488 (1974).

11. Under the *Campbell* rule Westland is not entitled to compensation for any reduction in the value of the uncondemned portion of its parcel resulting from the increased use of the frontage road or the proximity of the landfill, because the frontage road and the landfill are not on land acquired from Westland by condemnation. Moreover, the logical underlying the *Campbell* rule supports the denial of such compensation in this case. An owner's property right to land does not encompass the right to control the use of land owned by others. Only in the exceptional case is a property owner entitled to damages or injunctive relief because of a reduction in the value of land caused by activity on a neighbor's land. *See Scott v. Jordan*, 99 N.M. 567, 661 P.2d 59 (Ct. App. 1983). In other words, the neighbor's activity, even though it may reduce the value of the owner's land, ordinarily violates no property right of the owner. But if the activity violates no property right of the owner, then the government owes the owner no compensation for engaging in the activity. *See Aguayo v. Village of Chama*, 79 N.M. 729, 449 P.2d 331 (1969) (discussing when damages are recoverable because of nearby public sewage disposal plant). As the United

States Supreme Court recently stated, the law governing takings "has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property.' " *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992). Campbell expressed the proposition as follows:

> If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users.

266 U.S. at 371-72.

12. Turning to the facts of this case, Westland does not contend in its brief in chief that even if no portion of its parcel had been condemned, it would still be entitled to compensation from the city for damages arising from the proximity of its land to the landfill or from the increased traffic on the frontage road. The failure to pursue this contention appears sound. The City already owned the Cerro Colorado Landfill. If it had acquired access to the site via a roadway on land not condemned from Westland, Westland would ordinarily have no claim for compensation, *see Aguayo*, even though any reduction in the value of Westland's parcel caused by the proximity of the landfill would be the same regardless of the location of the access road. (As did the trial judge, we distinguish (1) damage due to proximity of the landfill from (2) damage due to traffic on the access road going to and from the

landfill.) Westland has not suggested that operation of the landfill site in itself intrudes upon a property right of Westland.

13. Likewise, we have been given no reason to determine that the improvements to the frontage road and the increased traffic flow upon it injured Westland's property rights. The City owned the frontage right of way. It could have improved the road at any time without compensating Westland. Any number of developments could have led to increased traffic flow along the road. The New Mexico Supreme Court has held that the owner of property abutting a public highway has no claim to compensation for changes in the highway so long as the changes do not deprive the owner of adequate access to public roads. *E.g., State ex rel. State Highway Comm'n v. Silva,* 71 N.M. 350, 352, 378 P.2d 595, 596 (1962) (owner of land abutting highway has no vested interest in flow of traffic past his premises); *see Iles v.Commonwealth, Dep't of Transp.,* 555 A.2d 312 (Pa. Commw. Ct. 1989) (increased traffic did not create compensable taking; taking requires that owner be substantially deprived of use and enjoyment of her property, but owner here still resided in premises and operated beauty salon there); *see generally* Robert A. Brazener, Annotation, *Traffic Noise and Vibration from Highway as Element of Damages in Eminent Domain,* 51 A.L.R.3d 860, § 3 (1973).

14. Also, as in *Campbell,* there was no practical problem with distinguishing between damages caused by use of the condemned property and damages caused by use of property not condemned from the claimant. The trial judge had no apparent difficulty in admitting evidence of damages caused by traffic along the access road (which

was on property actually taken from Westland) while excluding evidence of damages caused by traffic along the frontage road and by proximity to the landfill. Thus, the considerations that convinced the United States Supreme Court to deny the condemnee's claim in *Campbell* also argue for rejection of Westland's claim in this case.

15. We recognize that some courts have tempered what appears to be the strict rule of *Campbell*. For example, the Ninth Circuit Court of Appeals, relying on portions of the above-quoted language from *Campbell*, has held that the strict rule of *Campbell* does not apply when

> (1) the land taken from the condemnee landowner was indispensable to the . . . project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the . . . project.

United States v. 15.65 Acres of Land, 689 F.2d 1329, 1332 (9th Cir. 1982) (acquisition of land as portion of national recreation area; reversing and remanding award to owner because court permitted compensation for diminution in value of retained property caused by the taking and use of neighboring tract without requiring that the three listed elements be established), *cert. denied*, 460 U.S. 1041 (1993); *accord United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961) (timber producer entitled to compensation for damages from reduced accessibility of uncondemned land caused by flooding of condemned land and

government land as part of dam project; but damages not recoverable for fire threat created by increased recreational use of government land); *State v. Schmidt*, 867 S.W.2d 769, 778-79 (Tex. 1993), *cert. denied*, 114 S. Ct. 2741, *and cert. denied*, 115 S. Ct. 64 (1994).

16. Other courts have adopted a similar test that appears to be rationalized by essentially the same considerations. One leading case stated that "where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land." *Andrews v. Cox*, 29 A.2d 587, 590 (Conn. 1942); *accord City of Crookston v. Erickson*, 69 N.W.2d 909 (Minn. 1955).

17. But these seemingly more generous standards provide little comfort for Westland. The additional generosity is quite limited. Westland's claim clearly fails the third requirement of the three-part test stated in *15.65 Acres* because, as discussed above, the damages from use of the condemned portion of the parcel were separable from those caused by use of the frontage road and by proximity of the landfill. The case we have found that is most closely in point factually to the present case rejected compensation on just that ground. In *Griffith v. Montgomery County*, 470 A.2d 840, 845 (Md. Ct. Spec. App.), *cert. denied*, 479 A.2d 373 (Md. 1984), *and cert. denied*, 469 U.S. 1191 (1985), the court held that landowners were not entitled to compensation for the reduction in value of their land resulting from the use of an adjacent landfill even though a portion of their property had been condemned to construct the access road to the landfill.

18. The rule adopted in *Andrews* also does not aid Westland. The requirement that there be an "integral and inseparable part of a single use" has not been applied expansively. In *Andrews* itself, for example, the loss in value of the landowner's remaining property resulted from an embankment that obstructed the view from the property. The embankment was constructed as part of a highway project. The slope of the embankment began on the land condemned from the owner. The decision to award compensation was based on the fact that the portion of the embankment on the condemned land was "an integral and inseparable part of a single use" – the embankment – which reduced the market value of the remainder of the owner's land.

19. Particularly illuminating is the opinion in *City of Crookston*, which adopted the *Andrews* test. *City of Crookston*, 69 N.W.2d at 914. In that case the city condemned all or part of three tracts: A, B, and C. A sewage disposal plant was to be constructed on tract A, all of which was condemned. In addition, six and one-half acres of tract B were condemned as part of the site for the sewage plant, although no construction would actually be placed on the tract B acreage. The court ruled that the jury should determine whether the tract B acreage "was an integral and inseparable part of the sewage disposal plant project." *Id.* If so, the jury would need to consider the effect of the disposal plant in determining the reduction in market value of the remainder of tract B. As for tract C, the city condemned from that tract a strip 33 feet wide to provide a right of way for the sewer pipe leading from the river to the sewage disposal plant. The court held "as a matter of law, the use of the land taken on tract C does

not constitute an integral and inseparable part of the sewage disposal plant project and therefore any depreciation in the market value of tract C resulting from the mere proximity of the disposal plant and the contemplated user thereof is not recoverable." *Id.* We see no principled distinction between the right of way for the pipe to the sewage plant and the right of way for the access road to the landfill. Just as the pipe is separable (in terms of measurement of damages) from the sewage plant, the access road is separable from the landfill. Also, in our view, as previously stated, damages caused by increased traffic on the frontage road are equally separable from damages caused by use of the access road.

20. In sum, the great (perhaps unanimous) weight of case authority and the rationale for such authority convinces us that the trial judge properly denied Westland compensation for any reduction in the value of the uncondemned portion of its parcel resulting from the proximity of the landfill and the increased traffic on the frontage road.

21. II. ALLEGED VIOLATION OF PRETRIAL ORDER AND MISLEADING OF WESTLAND

The pretrial order entered in this case prohibited the introduction at trial of evidence of damages to Westland's "remaining property resulting from the creation, existence and operation of the Cerro Colorado Landfill on adjoining property." Westland contends that the district court violated the pretrial order when it admitted testimony by the City's appraiser "regarding development and land values around the Rio Rancho landfill in an

effort to show that the existence of the Rio Rancho landfill does not negatively affect land values." Westland's characterization of the appraiser's testimony is incorrect. The testimony related to the impact on property values of garbage truck traffic along roads leading to the Rio Rancho landfill, not the impact on property values of the proximity of the landfill. Admission of the evidence did not violate the pretrial order. The evidence was admissible to rebut claims by Westland regarding the diminution in value of its property arising from garbage-truck traffic along the access road through its parcel.

22. In a similar argument Westland contends that the trial judge misled it regarding what evidence would be admissible. It claims that the judge indicated that Westland could not introduce evidence regarding the impact of the landfill on property values but then permitted the City to introduce such evidence. Our review of the record reveals no such error. The trial judge consistently prohibited testimony by both parties regarding the impact on property values of proximity to a landfill. At the same time, however, the court consistently admitted evidence regarding the impact on property values of traffic going to and from landfills. The trial judge's rulings were both consistent and proper.

23. **III. EXCLUSION OF WESTLAND DIRECTORS FROM TRIAL**

At the beginning of the trial the City requested the trial judge to exclude witnesses from the courtroom pursuant to SCRA 1986, 11-615 (Repl. 1994). The purpose of

the rule is to prevent witnesses from shaping their testimony to match that given by preceding witnesses. *State v. Ortiz*, 88 N.M 370, 377, 540 P.2d 850, 857 (Ct. App. 1975). The court ordered exclusion of all witnesses except for one representative designated by each party. Westland designated Leroy Chavez, a project engineer for Westland. Westland complains about the exclusion of Barbara Page and Carlos Saavedra, who were directors and shareholders of Westland. It contends that an owners and directors, Page and Saavedra were parties who could not be excluded from the courtroom.

24. We disagree. Rule 11-615 states:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of:
>
> A. a party who is a natural person; or
>
> B. an officer or employee of a party which is not a natural person designated as its representative by its attorney; or
>
> C. a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Because Westland is not a natural person, the Rule permits only one client representative to be designated by Westland's attorney. The court did not err in excluding Page and Saavedra. *See Oliver B. Cannon & Son v. Fidelity & Casualty Co.*, 519 F. Supp. 668, 679 (D. Del. 1981). In any event, the exclusion order had no effect on Page, who was the first witness at trial and was permanently excused by the trial judge after she completed her testimony, thereby

freeing her to remain in the courtroom throughout the trial. Saavadra was the third witness at trial and was also free to remain in the courtroom after he testified. We find without merit Westland's contention that the exclusion of the witnesses violated due process.

25. IV. EXCLUSION OF TESTIMONY BY BOARD MEMBER REGARDING DAMAGES

Westland complains that the trial judge did not allow Carlos Saavedra to testify regarding the loss in value of Westland's property resulting from the condemnation. It contends that the owner of condemned property is entitled to testify to the value of the property and that Saavedra, as a member of Westland's board of directors, was an owner of the Westland parcel.

26. We agree that ordinarily an owner should be permitted to testify as to the value of property taken in condemnation. *See State ex rel. State Highway Comm'n v. Chavez*, 80 N.M. 394, 396, 456 P.2d 868, 870 (1969). Nevertheless, it was within the trial judge's discretion to refuse to permit Saavedra's testimony. The trial judge had already permitted Barbara Page, president and chief administrative officer of Westland, to testify regarding the value and decrease in value of the property. She had testified that the loss in value due to the taking was $10 million to $12 million. Also, Leroy Chavez, Westland's project manager, had been permitted to testify that the loss in value to Westland's property was $12 million. Westland tendered Saavedra's testimony that the loss in value to Westland's property would be $14 million.

27. The trial judge was not required to permit every director, officer, or shareholder of Westland to testify on substantially the same matter. Relevant evidence may be excluded if it constitutes "needless presentation of cumulative evidence." SCRA 1986, 11-403 (Repl. 1994). We defer to the sound discretion of the trial judge in determining whether evidence should be excluded as cumulative. *See State v. Lovato*, 91 N.M. 712, 715, 580 P.2d 138, 141 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978). We find no abuse of discretion here.

28. V. EXCLUSION OF EVIDENCE IN CROSS-EXAMINATION

Westland complains that the district court improperly hampered its cross-examination of the City's witnesses. It raises several specific matters. We can dispose of each summarily.

29. First, Westland complains about the exclusion of several reports filed by the City with a state agency. The trial judge refused to admit them because they had not been disclosed in the pretrial order, *See State ex rel. State Highway Dep't v. Branchau*, 90 N.M. 496, 565 P.2d 1013 (1977), and were cumulative evidence. We need not address the merits of the judge's ruling. Although Westland argues that the reports would impeach testimony by City witnesses, its brief fails to direct us to the specific testimony that would have been impeached. We will not search the record for error and therefore reject Westland's complaint. *See Sharts v. Walters*, 107 NM 414, 420, 759 P.2d 201, 207 (Ct. App. 1988).

30. Second, Westland complains about the exclusion of certain photographs. The court examined a box of pictures offered by Westland and required Westland to pick the five best representatives of what it wanted to show; the others were excluded. Westland has failed to establish why the remaining photographs would not have been needlessly cumulative. *See* SCRA 11-403.

31. Third, Westland complains that it was not permitted to cross-examine Dr. Gene Romo using minutes of a meeting of the board of county commissioners. But the portions of the trial transcript to which Westland refers contain cross-examination in which Dr. Romo was questioned on the basis of the minutes. We fail to see any error.

32. Fourth, Westland contends that it was not permitted to cross-examine the manager of the Rio Rancho Landfill regarding violations by his company in the operation of landfills in New Mexico. At trial, after Westland's attorney asked the witness whether his company had been cited by the state environmental department, the attorney explained to the court: "If the properties around the landfill are supposed to be so valuable, I think the relevance is that if the operation of the landfill is not appropriate, then it certainly tends to lower the value of the surrounding properties." The trial judge ruled that the evidence was irrelevant. We agree because, as explained above, the impact of the operation of the landfill was not an appropriate element of damages.

33. Fifth, Westland contends that the trial judge did not allow it to introduce into evidence Travis Engelage's deposition for the purpose of impeaching his testimony.

The trial judge permitted Westland to cross-examine the witness from his deposition by reading questions and answers from the deposition. The trial judge, however, refused to admit the deposition itself into evidence because he did not think that the deposition testimony was inconsistent with the witness's testimony at trial. SCRA 1986, 11-801(D)(1)(a) (Repl. 1994) (prior inconsistent statement of trial witness is not hearsay). On appeal Westland has made no effort to show that Engelage's deposition testimony was inconsistent with his trial testimony. We affirm the ruling of the district court.

34. Finally, Westland complains that it was not permitted to use various other documents to cross-examine the City's witnesses. But because Westland fails to describe the contents of the documents or explain why they were appropriate for cross-examination, we need not address the contentions. The appellant has the burden to point out clearly and specifically the error it asserts on appeal. *See Novak v. Dow*, 82 N.M. 30, 33, 474 P.2d 712, 715 (Ct. App. 1970).

35. **VI. PHOTOGRAPHS AND JURY VIEW**

Westland contends that the jury was unable to determine the true condition of the portion of Westland's parcel that was not condemned because the trial judge refused to admit some of Westland's tendered photographs and refused to permit a jury view of the property. We disagree. The trial exhibits contain sufficient diagrams and photographs that the judge could properly determine that additional photographs and a jury view were unnecessary to the jury's full understanding of the

matters at issue. *See El Paso Elec. Co. v. Landers*, 82 N.M. 265, 266, 479 P.2d 769, 770 (1970) (jury view is within discretion of trial judge).

36. **VII. CONCLUSION**

For the above reasons, we affirm the judgment of the district court.

37. **IT IS ORDERED.**

/s/ Harris L. Hartz
HARRIS L. HARTZ, Judge

WE CONCUR:

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

/s/ Bruce D. Black
BRUCE D. BLACK, Judge (in result only)

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, December 13, 1995

NO. 23,293

CITY OF ALBUQUERQUE,
a municipal corporation,

Plaintiff-Respondent,

vs.

WESTLAND DEVELOPMENT CO., INC.,
a New Mexico corporation,

Defendant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **15667.**

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Chief Deputy

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

January 9, 1996

NO. 23,293

CITY OF ALBUQUERQUE,
a municipal corporation,

Plaintiff-Respondent,

vs.

WESTLAND DEVELOPMENT CO., INC.,
a New Mexico corporation,

Defendant-Petitioner.

ORDER

This matter coming on for consideration by the Court upon motion to reconsider denial of petition for writ of certiorari and request for oral argument, and the Court having considered said motion and request and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion and request hereby are DENIED.

SECOND JUDICIAL DISTRICT
COURT COUNTY OF
BERNALILLO STATE OF NEW
MEXICO

NO. CV 89-10950

CITY OF ALBUQUERQUE, a
municipal corporation,

Petitioner,

vs.

WESTLAND DEVELOPMENT
COMPANY, INC., a New Mexico
Corporation; COUNTY OF
BERNALILLO; TAXATION AND
REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO;
PUBLIC SERVICE COMPANY
OF NEW MEXICO, a New
Mexico Corporation; AMERICAN
TELEPHONE AND
TELEGRAPH; AND ANY AND
ALL UNKNOWN CLAIMANTS
OF the PROPERTY INVOLVED,

Defendants.

ENDORSED
FILED IN MY
OFFICE THIS

JUL 15 1991

/s/ Thomas J. Ruiz
CLERK DISTRICT
COURT

DEFENDANT WESTLAND DEVELOPMENT COMPANY, INC. RESPONSE TO PETITIONER'S MOTION IN LIMINE

COMES NOW Defendant Westland Development Company, Inc. (Westland) and requests the Court to deny the Petitioner's Motion In Limine which seeks to exclude evidence of the effect of the existence of the Cerro Colorado Landfill on the value of Westland's land after December 13, 1989, for the following reasons:

PETITIONER'S MOTION IGNORES THE MEASURE OF DAMAGES TO REMAINDER IN PARTIAL CONDEMNATION CASES IN NEW MEXICO

In New Mexico, the legislature has set forth the parameters to be followed in establishing just compensation to be awarded in cases where only a portion of Defendants' property is taken or damaged, which is set forth in 42A-1-26 NMSA 1978 Comp. as follows:

> "In any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking. In determining such difference, all elements which would enhance or diminish the fair market value before and after the taking shall be considered even though some of the damages sustained by the remaining property, in themselves, might otherwise be deemed non-compensable. Further, in determining such values or differences therein, elements which would enhance or benefit any property not taken shall only be considered for the purpose of offsetting any damages or diminution of value to the property not taken."

Section 42A-1-26, is in harmony with Article II, Section 20 of the New Mexico Constitution which provides:

> "Private property shall not be taken or damaged for public use without just compensation."

New Mexico is among those states whose constitutions provide for damages as well as takings. Of note is

the U.S. Constitution, Amendment V where is found the following language:

> ". . . . nor shall private property be taken for public use, without just compensation."

Section 42A-1-26 (formerly 1953 Comp. Section 22-9-9.1) was first addressed by the Supreme Court in *State vs. Hesselden,* 84 N.M. 424, 504 P.2d 634 (1972). At page 426, the Court states effective of the statute as follows:

> "Section 22-9-9.1, supra, is a new statute which did not and does not alter, amend or modify any other existing statutes. It merely codifies the correct and existing rule or measure of damages in cases of a partial taking, in harmony and compliance with the payment of just compensation for the taking of private property as required by Article II, Section 20 of the New Mexico Constitution. To the extent that any prior decisions may have excluded properly compensable elements of damage and thereby resulted in a lesser amount of compensation, they did not follow the correct and existing rule as to the measure of damages necessary to achieve just compensation required by the Constitution of New Mexico, and are hereby specifically reversed."

In so far as the *Aguayo vs. Village of Chama;* 79 N.M. 729, 449 P.2d 331 (1969) case cited by Petitioner, does not conform with the rule as set forth in the *Hesselden* case, the decision therein has been specifically reversed and is therefore of questionable value in assisting the Court to arrive at a decision on Petitioner's motion. Additionally, the case does not involve a taking of any property from

Aguayo which is generally required in order to maintain an action in condemnation or inverse condemnation, and is therefore distinguishable from the case before the Court since a taking did occur upon which this condemnation case is based.

The case before the Court may be more similar to *City of Clovis vs. Ware*, 96 N.M. 479 (1981) than Petitioner represents, as in Ware, a taking did occur from Westland which is an integral and inseparable part of the Cerro Colorado Landfill operation which will be discussed later. The road to the landfill is as essential to it as though it were placed on Westland's property itself.

A brief description as to the Cerro Colorado Landfill operation may be of use in establishing whether Westland is entitled to show severance damages to its remainder property due to the existence of the landfill, aside from the right as set forth in Section 42A-1-26, discussed previously. Westland agrees that Petitioner had acquired the land upon which the landfill is situate before the condemnation action to acquire the access road to the landfill was filed against Westland on December 13, 1989. However, the strongest possible support that Westland can present for this argument that the road is an integral and inseparable part of the landfill is found in Petitioner's Amended Complaint for Condemnation which was filed on February 8, 1991. Paragraph II sets forth the purpose for the condemnation action as follows:

> "It is necessary for the Petitioner to acquire by condemnation the property, property rights, easements and licenses herein sought for the purpose of constructing, reconstructing or improving public roads, streets or highways for

> public purposes and for the purpose of accomplishing the removal of any and all encroachments upon the right of way *and for all other purposes in connection with construction of Cerro Colorado Landfill Project*, Albuquerque, Bernalillo County, New Mexico." (Emphasis added)

Westland requests the Court to review Exhibits Y and Z attached to the Petition in conformance with Section 42-2-5(4) NMSA, 1978 Comp. It is important to note that the road which is the subject of this condemnation action dead ends at the Cerro Colorado Landfill and was constructed to serve no other purpose. Therefore, the road must be recognized to be an integral and inseparable part of the single use to which Westland's condemned land and the adjoining land to the west belonging to Petitioner are used.

No action by Petitioner was taken to develop the landfill until the required right of way for the Cerro Colorado access road was acquired from Westland through the condemnation process now before the Court and more importantly, not before the access road to the landfill was actually constructed which caused the development of the landfill to be possible. Realistically, the road across Westland's property which is identified as "Tract C" to the Petition may be described as an appendage to the Cerro Colorado Landfill which would be useless to Petitioner without it.

Westland's position is supported by a Florida decision – *Lee County vs. Exchange Nat'l Bank*, 417 So.2d, 268: (From Nichols on Eminent Domain, page 14-64:)

> "In the case of a partial taking a landowner is generally entitled only to such damages to the

remainder as are attributable to the use or activity on the land which is taken and is not entitled to such consequential damages from activity occurring on land which is taken from others. Annot., 59 A.L.R.3d 488, 499 (1974). The most prominent authority for this rule is *Compbell vs. United States*, 266 U.S. 368, 45 S.Ct. 115, 69 L.Ed. 328 (1924), in which the government took a portion of the landowner's property for use in the construction of a nitrate plant. However, the actual plant was to be built on property taken from other landowners. In rejecting the landowners' claim for damages to the remainder caused by the proposed nitrate plant, the court said:

> "The rule supported by better reason and the weight of authority is that the just compensation assured by the 5th Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking."

226 U.S. at 372, 45 S.Ct. 15 117 (citations omitted).

However, the rule is often subject to an exception which authorizes an award for damages to the remainder where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put. Annot., 59 A.L.R.3d 488, 501 (1974). A good example of the application of the exception is found in cases in which the landowner is permitted to recover for the damages to the remainder of his property caused where the condemned land is to be used as part of the construction of a highway. *E.g.*,

> *Andrews v. Cox,* 129 Conn. 475, 29 A.2d 587 (1942). These cases are grounded on the premises that it is impossible to separate the damages caused by the small portion of the highway built upon the taken land from the damages caused by the highway as a whole. *But see Kentucky Department of Highways v. Williams,* 487 S.W.2d 290 (Ky. Ct. App. 1972)."

Also in Nichols, 1991 Supplement there is found at page 14-124:

> "5.1 **United States** – United States v. 33.5 Acres of Land, 789 F.2d 1369 (9th Cir. 1986), in which the court held that where there is a partial taking and the value of the remaining portion of the parcel depreciates because of the proposed use of the taken parcel, the owner is entitled to "severance damages" for the damage to the remaining parcel. The Bonneville Power Administration condemned a ranch in order to acquire a power line easement thereon. On its behalf, the United States sought to exclude evidence of the infestation of diffuse knapweed, which respondent claimed was a byproduct of the taking. The court held that evidence of the infestation was admissible to establish the reduced value of the remaining parcel."

At page 14-72 (Section 14.03[1]) of Nichols, in discussing a Minnesota case, *City of Crookston vs. Erickson,* 244 Minn. 321, 69 N.W. 2d 909, the Court modified the general rule that an owner of the remainder area is not ordinarily entitled to recover for damage caused the remainder by the taker's use of property acquired from adjoining landowners even though his and all property taken from others is used to further the same project.

"The court, however, felt that the rule was sometimes impractical of application since it involved an attempt to separate what was factually inseparable. It adopted a modification of the rule, saying:

> "We therefore modify the rule of the Adams case to the extent that, where a part of an owner's land is taken for a public improvement such as this, and the part taken 'constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put,' the owner is entitled to recover the full damage to his property doe to such public improvement, even though portions of the public improvement are located on land taken form surrounding owners. The determination of whether the part taken constitutes 'an integral and inseparable part' of the whole improvement ordinarily is a question for the trier of the fact, and where the use of the part taken is found to be separable, consequential damages should be allowed only for the use of the part taken, in accordance with the Adams case." "

and at page 14-73 of Nichols, a Tennessee case provides the following ruling which is also consistent with Westland's position:

"**Tennessee** – Pack v. Boyer, 438 S.W.2d 754, in which the court said:

> "Counsel for the Commissioner cite L. & N, Railroad v. Dudley, 161 Tenn. 546, 20 S.W.2d 278, wherein the Supreme Court said the general rule for assessment of incidental damages is that the injuries to the residue of

the tract, part of which is taken, which will entitle the owner to compensation, are such as especially affect him and not such as are suffered by the community generally. However, the Court added this:

> " 'The rule is extended upon facts proven and which show that exceptional circumstances attend the taking and use of the land which impair the value of the remainder, and so, if the use of the part taken is attended by peculiar facts and circumstances, that result in special injury to the remainder of the land, the fact that such special injury is common to all property in the community would not exclude consideration of the special injury as an element to be considered in assessing the incidental damages.' L. & N. R. R. Co. v. Dudley, supra, p. 551, 30 S.W.2d p. 280.
>
> "The evidence in the instant case convinces us that such exceptional circumstances are present in the case, so as to bring it within the above stated extension of the rule."

A New Jersey case is also cited in Nichols, page 14-75 (Section 14.03[1])

> "**New Jersey** – State, By State Highway Commissioner v. Board of Education of City at Elizabeth, 282 A.2d 71, in which the court said:
>
> "Where part of an owner's land is taken for a public improvement such as this, and the part taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put,

the owner is entitled to recover the full damage to his remaining property due to such public improvement, even though portions of the public improvement are located on land taken from surrounding owners. The determination of whether the part taken constitutes an integral and inseparable part of the whole improvement ordinarily is a question for the trier of the facts. City of Crookston v. Erickson, 244 Minn. 321, 69 N.W.2d 909 (Sup. Ct. 1955); Andrews v. Cox, 129 Conn. 475, 29 A.2d 587 (Sup. Ct. Err. 1942).

"Furthermore, in *Andrews, supra,* the court stated:

> "' * * * Where the use of the land taken constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put, the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land. * * * '"

As the court said in *Crookston, supra,* "The determination of whether the part taken constitutes an integral and inseparable part of the whole improvement ordinarily is a question for the trier of the fact." As the trier of the facts, it is the opinion of this court – after reviewing the testimony and exhibits – that the part taken from defendant Board does constitute an integral and inseparable part of the whole improvement; that it was part of the unitary single use, namely, Interstate Route 278."

From the facts present in the condemnation case before the Court, it is clear that the exception to the general rule applies and Westland should be allowed to present evidence and testimony regarding any loss or diminution in the fair market value of its property due to the existence of the Cerro Colorado Landfill, in conformance with Section 42A-1-26; Article II, Section 20 of the New Mexico Constitution; *State vs. Hesselden* and the cases cited herein.

Also, in the case before the Court, it is Westland's position that due to the language contained in the Petition, Paragraph II, as a matter of law, the access road to the Cerro Colorado Landfill Project constitutes an inseparable and integral part of the single use for which it was constructed and damages caused to Westland by the existence of the landfill are therefore admissible in evidence at trial.

THE AREA TO BE APPRAISED IN CONDEMNATION PROCEEDING IS ESTABLISHED BY THE UNITY RULE

Westland owns approximately 49,000 acres generally situated west of Coors Road and extending to the Rio Puerco and north of Interstate 40 and south of Central Avenue and I-40.

The tract of land from which this condemnation case arises is located south of Central Avenue and I-40 and is accurately set forth in a plat of survey of Westland Development Company "South Tract" comprising 14,960.055 acres (Please see Exhibit A). The first appraisal prepared by Westland in response to the condemnation action filed

by the City reflected a larger parcel of Westland's total ownership south of Central Avenue and I-40. This appraisal was delivered to the Petitioner on May 14, 1990. As a result of the Petitioner's revision of the taking as is set forth in the Amended Complaint for Condemnation filed February 8, 1991, a revised appraisal then became necessary in order to reflect the change in the taking. Before the revised appraisal was completed, discussions were had with Petitioner in order to establish a larger parcel which would be in conformance with Section 42A-1-26. Westland again reviewed the larger parcel which was furnished to Petitioner in response to Interrogatories propounded by it and amended or revised the larger parcel to 13,000 acres.

It is Westland's position that the 13,000 acres as identified by it to Petitioner is the correct larger parcel and would be consistent with Section 42A-1-26 NMSA, 1978 Comp. only if Petitioner agrees with and stipulates to this larger parcel. Should Petitioner not agree with Westland's position that only the 13,000 portion of the South Tract as identified by Exhibit A attached hereto is properly to be considered the larger parcel, then Westland would be forced to use its entire ownership of 49,000 acres as the larger parcel in conformance with Section 42A-1-26 and a host of New Mexico cases addressing this point: *Board of County Com'rs vs. Slaughter,* 49 N.M. 141, 158 P.2d 859 (1945); *Boad of Com'rs of Dona Ana County vs. Gardner,* 57 N.M. 478, 260 P.2d 682 (1953); *Board of County Com'rs of Lincoln County vs. Harris,* 60 N.M. 315, 366 P.2d 710 (1961); *Transwestern Pipe Line Co. vs. Yendell,* 69 N.M. 448, 367 P.2d 938 (1961); *Board of Trustees vs. B.J. Service,* 75 N.M. 459, 406 P.2d 171 (1965); *State vs. Pelletier,* 76 N.M. 555,

417 P.2d 46 (1966); *State vs. A.T. & S.F.*, 76 N.M. 587, 417 P.2d 68 (1966); *City of Albuquerque vs. Chapman*, 76 N.M. 162, 413 P.2d 204 (1966); *Roosevelt County vs. Bowley*, 78 N.M. 9, 427 P.2d 894 (1967); *State vs. Brock*, 80 N.M. 80, 451 P.2d 984 (1968); *State vs. Grenko*, 80 N.M. 691, 460 P.2d 56 (1969); *State vs. Hesselden*, 84 N.M. 424, 504 P.2d 634 (1972), *State vs. Kistler Collister*, 88 N.M. 221, 539 P.2d 611 (1975), *El Paso Electric Co. vs. Pinkerton*, 96 N.M. 473, 632 P.2d 350 (1991); *City of Clovis vs. Ware*, 96 N.M. 479, 632 P.2d 356 (1981). Copies of all cases and materials cited in this brief are being made available to the Court for his information, review and use.

Since Westland has based its response to Petitioner's condemnation on the fact that only 13,000 of its entire ownership of 49,000 acres are affected and should be considered for purposes of this action, Westland would not be ready to proceed to trial at this time should the Court rule that Westland's entire ownership be considered in conformance with the New Mexico law as set forth herein. An appraisal of its entire holdings on the west side of the City of Albuquerque which are unified in use, contiguity and ownership would need be appraised (see *SHD vs. Gray*, 81 N.M. 399, 467 P.2d 725 (1970); *SHD vs. Strosnider*, 106 N.M. 608, 747 P.2d 254 (1987) and *Yates Petroleum Corp. vs. Kennedy*, 108 N.M. 564, 775 P.2d 1281. Such an appraisal would involve a great amount of time and resources of Westland and is deemed by Westland to be totally unnecessary.

WHEREFORE, Westland prays the Court to enter an Order:

1. That the effects of the existence of the Cerro Colorado Landfill may be considered as a damage at trial.

2. That the larger parcel to be considered at trial is the 13,000 acres situated south of Central since it enjoys the requirements of Unity of use, contiguity and ownership.

Respectfully Submitted

/s/ Richard L. Russell
Richard L. Russell
Attorney for Defendant
Westland Development
Company, Inc.
1396 Hyde Park Road
Santa Fe, New Mexico 87501
Telephone (505) 982-5080
Telecopier (505) 982-0828

I hereby certify that a true and correct copy of the foregoing pleading was hand-delivered to opposing Counsel on the 12th day of July, 1991.

/s/ Richard L. Russell
Richard L. Russell

EXHIBIT A

SECOND JUDICIAL DISTRICT
COURT COUNTY OF
BERNALILLO STATE OF NEW
MEXICO

NO. CV 89-10950

CITY OF ALBUQUERQUE, a
municipal corporation,

Plaintiff,,

vs

WESTLAND DEVELOPMENT
COMPANY, INC., a New Mexico
Corporation; COUNTY OF
BERNALILLO; TAXATION AND
REVENUE DEPARTMENT OF
THE STATE OF NEW MEXICO;
PUBLIC SERVICE COMPANY
OF NEW MEXICO, a New
Mexico Corporation; AMERICAN
TELEPHONE AND
TELEGRAPH; AND ANY AND
ALL UNKNOWN CLAIMANTS
OF THE PROPERTY INVOLVED,

Defendants.

ENDORSED
FILED IN MY
OFFICE THIS

JUN 24 1993

/s/ Thomas J. Ruiz
CLERK DISTRICT
COURT

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTIONS IN LIMINE AND FOR PARTIAL SUMMARY JUDGMENT,

This matter having come before the Court upon Petitioner's Motion in Limine and Motions of Partial Summary Judgement to bar Defendant from (1) introducing evidence of the effect of the Cerro Colorado Landfill on the Defendant Westland's adjoining property; (2) barring

Defendant from introducing evidence of the effect on Westland's remaining property of increased traffic on the previously existing Public Road; and (3) barring Defendant from introducing evidence of the effect on Westland's remaining property of the content of the trucks using the new access road constructed on the the property taken by this action, and the Court having reviewed the briefs submitted by counsel, oral argument and affidavits filed herein, and being fully advised in the premises, FINDS:

1. In this action Westland is not entitled to damages to the remainder of Westland's property resulting from the proposed use or actual use made by the City of adjoining property (The Cerro Colorado Landfill).

2. In this action Westland is not entitled to damages to Westland's estate caused by the increased traffic on the existing frontage road which was upgraded to handle the contemplated traffic to the Cerro Colorado Landfill.

3. Westland is not precluded from presenting admissible evidence that the remainder of its property was damaged by the nature of the use of the property taken including the increased traffic and the use of the road by garbage trucks.

4. That the following interlocutory order does not practically dispose of the merits of the action.

5. This Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.

IT IS THEREFORE ORDERED AS A MATTER OF LAW that:

1. Damages, if any, to Westland's property resulting from the creation, existence and operation of Cerro Colorado Landfill on adjourning [sic] property are not compensable in this action.

2. Damages if any, resulting from the increased traffic on the upgraded frontage road to and from the Cerro Colorado Landfill are not compensable in this action.

3. Westland will be permitted to present admissible evidence of damage to the remainder property as a result of the nature of traffic contemplated on the property taken.

/s/ Gerald R. Cole
GERALD R. COLE,
DISTRICT JUDGE

CC:
Robert Waldman
Edward Pearson
Richard Russell

(2)

No. 95-1614

Supreme Court, U.S.
FILED
MAY 8 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

WESTLAND DEVELOPMENT COMPANY, INC., A NEW MEXICO CORPORATION,

Petitioner,

vs.

CITY OF ALBUQUERQUE, A MUNICIPAL CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the New Mexico Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT I. WALDMAN
Counsel of Record
EDWARD R. PEARSON
ROBERT M. WHITE
Attorneys for Respondent
P.O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500

8802
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

16 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does payment of just compensation required by the Fifth Amendment to the United States Constitution include payment to one whose property is partially taken for damages to the condemnee's remaining property resulting from the use of adjoining land previously owned by the condemnor?

2. Should this Court review its holding in *Campbell v. United States*, 226 U.S. 368 (1924), which was followed by the New Mexico Court of Appeals in this case, which held that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken by public use, does not include the diminution in value of the owner's remaining land caused by the acquisition and use of adjoining lands of others for the same undertaking?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Statement of the Case 1

Reasons for Denying the Writ 2

I. The New Mexico Court of Appeals followed the standards established by this Court in the *Campbell* opinion. 2

II. The reasoning of the *Campbell* case is clear and is the standard followed in most jurisdictions. ... 3

III. Westland does not fit into any of the *Campbell* rule exceptions. 8

IV. This case does not qualify for review upon writ of certiorari under any of the general standards listed in Rule 10. 10

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Andrews v. Cox, 29 A.2d 587 (Conn. 1942) 7, 10

Contents

	Page
Campbell v. United States, 226 U.S. 368 (1924)	*passim*
City of Crookston v. Erickson, 69 N.W. 2d 909 (Minn. 1955)	8, 9
Griffith v. Montgomery County, 470 A.2d 840 (Md. Ct. Spec. App.), *cert. denied*, 479 A.2d 373 (Md. 1984), *and cert denied*, 469 U.S. 1191 (1985)	7
Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992)	11
United States v. 15.65 Acres of Land, 689 F.2d 1329 (9th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983)	6
United States v. Pope & Talbot, Inc., 293 F.2d 822 (9th Cir. 1961)	6
United States Constitution Cited:	
Fifth Amendment	i
Rules Cited:	
Supreme Court Rules:	
Rule 10	10
Rule 10(b)	10
Rule 10(c)	11

STATEMENT OF THE CASE

On December 13, 1989, the City of Albuquerque ("City") filed this eminent domain lawsuit to acquire 22.788 acres out of Westland Development Co., Inc.'s ("Westland") 14,977.21 acre parcel for a 60 foot right-of-way upon which to construct a road ("Access Road") connecting the frontage road south of Interstate 40 ("Frontage Road") and the City's Cerro Colorado landfill (the "Landfill"), located just west of Westland's property. The land upon which the Landfill was built was acquired by the City in a property exchange with the U.S. Forest Service and Albuquerque Academy in 1984 for property in the Sandia Mountains. The previously existing Frontage Road was public right of way which was paved and improved by the City. No property was taken from Westland by the City in this eminent domain action for either the Frontage Road or the Landfill. A diagram showing the location of the Access Road taken by this action and also the location of the Frontage Road and the Landfill are included in the Court of Appeals opinion (Petitioner's Appendix, p. 3) and the Petition (p. 4). Although there was no previous public access road to the Landfill, the Court of Appeals recognized that the City could have acquired access to the Landfill from the north or west on land not owned by Westland.

At pretrial motions, the trial judge ruled and at trial instructed the jury that Westland was entitled to damages for the value of the property taken for the Access Road right-of-way and for the reduction in the value of Westland's remaining property resulting from the use of the Access Road for garbage truck traffic. Westland contended at trial and on appeal that it is entitled to recover damages to the uncondemned portion of its property caused by the entire project, including the Landfill itself and the increased traffic on the improved Frontage Road, and is not limited to damages caused by the Access Road

constructed on land taken by this eminent domain proceeding and the resulting use by garbage trucks. The New Mexico Court of Appeals affirmed the trial court, holding that damages from the proximity of Westland's remaining property to the Landfill and from increased traffic on the previously existing Frontage Road are not compensable. The New Mexico Supreme Court denied Westland's Petition for Writ of Certiorari to that Court. Although other issues were raised in the Court of Appeals, this is the sole issue raised in Westland's Petition to this Court for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE NEW MEXICO COURT OF APPEALS FOLLOWED THE STANDARDS ESTABLISHED BY THIS COURT IN THE *CAMPBELL* OPINION.

The United States Supreme Court has ruled on the issue involved in this case in *Campbell v. United States*, 266 U.S. 368 (1924). The facts in the *Campbell* are very similar to this case. In *Campbell*, the United States took possession of a 1,300 acre tract from several landowners to build a munitions plant during World War I. The government condemned 1.81 acres of the Campbell's property for the project. The District Court awarded damages to Campbell for the value of the land taken and also damage to Campbell's remaining property due to the land taken, the same as the District Court in this case. Campbell also sought damages for his remaining property due to the munitions plant built on the neighboring property acquired from others, as Westland seeks damages due to the Landfill on adjoining property already owned by the City. The United States Supreme Court limited consideration of damages to the owner's remaining property only to the taking and use of the condemned property, and gave

no compensation for damages due to the munitions plant built on adjoining land acquired from others. Following the *Campbell* opinion, the trial court allowed the jury to consider damages to Westland's remaining property due to the property taken by the condemnation for the Access Road and resulting use by garbage trucks. The trial court disallowed damages resulting from the project, none of which was built on land taken from Westland, for the improvements to the Frontage Road and Landfill. Affirming the trial court, the New Mexico Court of Appeals followed *Campbell*, disallowing damages due to the Landfill and Frontage Road, as the United States Supreme Court in *Campbell* disallowed damages due to the munitions plant built on adjoining land. The New Mexico Court of Appeals quoted from *Campbell* in its holding (Petitioner's Appendix, p. 10):

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. . . .

266 U.S. at 372.

II.

THE REASONING OF THE *CAMPBELL* CASE IS CLEAR AND IS THE STANDARD FOLLOWED IN MOST JURISDICTIONS.

Westland asserts that the rule of law established by this Court in the *Campbell* decision and followed by the District Court and the New Mexico Court of Appeals in this case should

be reviewed and changed. Petitioner initially argues that the reasoning of *Campbell* is unclear. The New Mexico Court of Appeals quoted the following language from the *Campbell* opinion (Petitioner's Appendix, p. 10 and 11).

> The land taken from plaintiff was not shown to be indispensable to the construction of the nitrate plant or to the proposed use of the other lands acquired by the Untied States. The damages resulting to the remainder from the taking of a part were separable from those caused by the use to be made of the lands acquired from others. The proposed use of the lands taken from others did not constitute a taking of his property. Plaintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. It is only because of the taking of a part of his land that be became entitled to any damages resulting to the rest. In the absence of a taking the provision of the Fifth Amendment giving just compensation does not apply; and there is no statute applicable in this case that enlarges the constitutional right. If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by

> the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users.

(*Id.* at 372).

The New Mexico Court of Appeals found nothing ambiguous in the reasoning of *Campbell* and applying the *Campbell* reasoning to this case stated: (Petitioner's Appendix. p. 12)

> Under the *Campbell* rule Westland is not entitled to compensation for any reduction in the value of the uncondemned portion of its parcel resulting from the increased use of the frontage road or the proximity of the landfill, because the frontage road and the landfill are not on land acquired from Westland by condemnation. Moreover, the logic underlying the *Campbell* rule supports the denial of such compensation in this case. An owner's property right to land does not encompass the right to control the use of land owned by others. Only in the exceptional case is a property owner entitled to damages or injunctive relief because of a reduction in the value of land caused by activity on a neighbor's land. *See Scott v. Jordan*, 99 N.M. 567, 661 P.2d 59 (Ct. App. 1983). In other words, the neighbor's activity, even though it may reduce the value of the owner's land, ordinarily violates no property right of the owner. But if the activity violates no property

> right of the owner, then the government owes the owner no compensation for engaging in the activity. See *Aguayo v. Village of Chama*, 79 N.M. 729, 449 P.2d 331 (1969) (discussing when damages are recoverable because of nearby public sewage disposal plant).

The New Mexico Court of Appeals correctly applied the clear and unambiguous rule and reasoning in the *Campbell* case to the facts of this case.

Westland further argues that this Court should reconsider the *Campbell* decision because the law on the issue is in turmoil because some courts have created an exception. As recognized by the Court of Appeals and Petitioner, the Ninth Circuit has created an exception to the strict rule of *Campbell* and has allowed consideration of the effect of the use of adjoining or the landowner's remaining property if the following requirements were met: *United States v. Pope & Talbot, Inc.*, 293 F.2d 822 (9th Cir. 1961); *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982) *cert. denied*, 460 U.S. 1041 (1983).

1) the land taken from the condemnee was indispensable to the project,

2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project, and

3) damages from the land taken and from the land not taken were inseparable.

Petitioner cites several state cases which have recognized this three part exception. Other state courts have found a one part exception if the property taken constitutes an integral and

inseparable use to which the land taken and other adjoining land is put. *Andrews v. Cox* 29 A.2d 587 (Conn. 1942).

The New Mexico Court of Appeals, after recognizing the exceptions, followed the rule in *Campbell* (Petitioner's Appendix, p. 12):

> Most jurisdictions that have considered the matter apply the *Campbell* rule. See, e.g., *8,960 Square Feet, More or Less v. State, Dep't of Transp. & Pub. Facilities*, 806 P.2d 843, 846 (Alaska 1991); *Utah Dep't of Transp. V. D'Ambrosio*, 743 P.2d 1220 (Utah 1987). See generally Annotation, Compensation for Diminution in Value of the Remainder of Property Resulting from Taking or Use of Adjoining Land of Others for the Same Undertaking, 59 A.L.R.3d 488 (1974).

The *Campbell* case established a bright line rule. The fact that some courts have recognized a qualification of the rule does not mean that the standard established by the highest court should be abandoned or need clarification, as asserted by Westland.

The Court of Appeals looked to cases from other jurisdictions which had similar facts. These cases followed the standard established in *Campbell*. The Court of Appeals cited *Griffith v. Montgomery County*, 470 A.2d 840 (Md. Ct. Spec. App.), *cert. denied*, 479 A.2d 373 (Md. 1984), *and cert. denied*, 469 U.S. 1191 (1985), a case with nearly identical facts, in which the Court held that landowners were not entitled to damages to their remaining land from an adjoining Landfill even though a portion of the landowner's land was condemned to construct a

road to the Landfill. The Court of Appeals also cited *City of Crookston v. Erickson*, 69 N.W.2d 909 (Minn. 1955), which denied compensation for proximity to a sewage disposal plant to a landowner whose property was taken for a sewer pipe leading from a river to the plant.

III.

WESTLAND DOES NOT FIT INTO ANY OF THE *CAMPBELL* RULE EXCEPTIONS.

In addition to applying the legal standards of *Campbell* to the facts of this case, the New Mexico Court of Appeals also analyzed the facts in this case against the legal standards in the exceptions that Westland asserts should have been applied. The Court of Appeals concluded (Petitioner's Appendix, p. 16), "But these seemingly more generous standards provide little comfort for Westland."

Even if this Court were to apply the recognized exceptions in this case, Westland still would not be able to prevail. The Court of Appeals held that Westland failed to meet the separability of damages requirement of the three part test. The Court of Appeals found that there was no practical problem distinguishing damages from the property taken and the use of property not taken in the condemnation. Westland criticizes the Court of Appeals' statement that damages were severable simply because the trial judge had no difficulty admitting evidence on damages from the Access Road and excluding evidence of damages caused by the adjoining Landfill and increased traffic on the Frontage Road. However the court's ruling was due in part to the Westland's own testimony that the damages were separable. Westland's own appraiser testified that damages to Westland's remaining property due to the Access Road resulted from the property within 1,000 feet of either side of the new Access Road

no longer having any contributory value to the entire parcel because of the garbage truck traffic. In Westland's appraiser's report, which was tendered as an offer of proof, their appraiser found damages from the Landfill and the Access Road devalued all of the property between the Access Road and the Landfill, and that to compensate Westland for damages from the increased traffic on the Frontage Road, Westland should be paid the cost of a substitute road to functionally replace the Frontage Road.

Westland faced no dilemma it claims in its Petition. Westland's own appraiser had no difficulty separating the damages. He testified as to damages from the Access Road and garbage trucks at trial, and submitted evidence of damages from the Landfill and Frontage Road by offer of proof.

The Court of Appeals used the *City of Crookston* case to illustrate the reason that Westland did not fit into the one part integral and inseparable part of the project exception recognized in that case, in which the landowner was denied damages from the proximity to a sewage treatment plant because a portion of their property was condemned for a sewer line to the plant. Citing *Crookston*, the Court of Appeals stated (Petitioner's Appendix, p 17-18):

> The court held "as a matter of law, the use of the land taken on tract C does not constitute an integral and inseparable part of the sewage disposal plant project and therefore any depreciation in the market value of tract C resulting from the mere proximity of the disposal plant and the contemplated user thereof is not recoverable." Id. We see no principled distinction between the right of way for the pipe to the sewage plant and the right of way for the access road to the landfill.

> Just as the pipe is separable (in terms of measurement of damages) from the sewage plant, the access road is separable from the landfill. Also, in our view, as previously stated, damages caused by increased traffic on the frontage road are equally separable from damages caused by use of the access road.

A case qualifying for the one part "integral and inseparable part" test was illustrated by the Court as *Andrews v. Cox*, 29 A.2d 587 (Conn 1942), in which a road embankment constructed as part of a highway project which obstructed the view from the landowner's property was considered an integral and inseparable part of a single use which reduced the market value of the landowner's remaining property. A roadway to the Landfill, as a sewer line to a treatment plant, is not integral and inseparable as a roadway is to an embankment upon which it is built.

IV.

THIS CASE DOES NOT QUALIFY FOR REVIEW UPON WRIT OF CERTIORARI UNDER ANY OF THE GENERAL STANDARDS LISTED IN RULE 10.

Considerations for review on certiorari by this Court are specified in Rule 10. The City recognizes that these considerations are not exclusive. The Court of Appeals' decision does not qualify under Rule 10(b) as conflicting with the decisions of the United States Court of Appeals or another state court of last resort. The Court of Appeals followed the *Campbell* decision of this Court and the majority of other courts. While considering the exceptions to *Campbell* created by some courts, the New Mexico Court of Appeals held that under the facts of this case Westland did not qualify under the exceptions.

Westland further does not qualify under Rule 10(c), that an important federal question has not been, but should be, settled by this Court or that the state court decision conflicts with relevant decisions of this Court. This Court established the standard in the *Campbell* case that a landowner is not entitled to damages to their property resulting from the uses made of adjoining property. The trial court and New Mexico Court of Appeals in this case followed this long standing standard exactly. Westland simply wants this rule changed because the rule established in *Campbell* denies Westland the compensation it seeks in this case.

CONCLUSION

The trial court correctly followed the rule in the *Campbell* case established by this Court in 1924. The New Mexico Court of Appeals affirmed, and the Supreme Court of New Mexico denied certiorari. Even if this Court reversed and adopted one of the exceptions, the Court of Appeals has already ruled that Westland does not fit into any of the exceptions so that the result would be the same.

Westland argues that *Campbell* is an old case and should be reviewed. However, as quoted by the New Mexico Court of Appeals, this Court quoted from *Campbell* in the recent case of *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992) (Petitioner's Appendix, p. 13):

> If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the

> United States is not greater than would be that of the private users.

266 U.S. at 371-2.

The New Mexico Court of Appeals correctly followed *Campbell*. There is no compelling reason for this Court to review the *Campbell* decision. Westland's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT I. WALDMAN
Counsel of Record
EDWARD R. PEARSON
ROBERT M. WHITE
Attorneys for Respondent
P. O. Box 2248
Albuquerque, New Mexico 87103
(505) 768-4500